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for judicial station. The truth is, and it is quite time it should be plainly spoken, that the court, whether through its fault or its misfortune, has been an actor in several scenes which have impaired public confidence in it as a judicial tribunal. We have called the Surratt trial a judicial farce—it was a farce, but of that melancholy kind at which thoughtful people do not laugh; and the disgust which was felt at the trial of Mary Harris, in the same court, is still fresh in the professional mind.

Trials at the Old Bailey, or The Tombs, and kindred courts, are always the occasions on which judicial and forensic proprieties are most ignored, but it is particularly unfortunate when a court which descends to the Old Bailey style, bears a title so similar to that of the great tribunal whose reputation is of national importance. We hope that Congress will speedily change the name of the Supreme Court of the District of Columbia, so that the Supreme Court of the United States, already menaced with sufficient dangers of its own in the perilous field of legal politics, shall not be loaded with any additional burdens of popular distrust.

J. T. M.

RECENT AMERICAN DECISIONS.

Supreme Court of Pennsylvania.

LORIN PALMER v. GEORGE S. HARRIS.

A trade-mark having upon it a false statement which did not, and could not produce any effect upon the purchasers of the article, is nevertheless so tainted by the falsehood that equity refuses to protect it.

A trade-mark for a brand of segars, manufactured in New York, had upon it, in Spanish, words, which interpreted into English, mean: "Factory of segars from the best plantations de la Vuelta Abajo, calle del Agua, Habana." Equity refused, on the ground of the falsehood, to enjoin a printer from counterfeiting the device, and supplying the trade with his imitations.

THIS was an appeal from a decree of the Court of Common Pleas of Philadelphia, which refused to grant an injunction to restrain Harris from counterfeiting Palmer's trade-mark.

The facts were that Palmer, a dealer in segars, designed a label for a particular brand which he manufactured, and which had acquired an extensive popularity in the United States as the

“Golden Crown.” The label contained a golden crown surrounded by a green wreath, and underneath this the words,

“FABRICA DE TABACOS DE LAS MEJORES VEGAS,
DE LA VUELTA ABAJO,
CALLE DEL AGUA, No. 73, HABANA.”

Harris, the defendant, printed an imitation of the design, containing the same words, and supplied dealers in the segar trade with the counterfeits, and thus enabled them, by attaching the imitation to their own segars, to avail themselves of the reputation which Palmer had acquired, and deprive him of the exclusive use and benefit of his trade-mark. Palmer’s design was copyrighted under the Act of Congress, February 3d 1831, 4 Stats. 436, § 1. The imitation was not denied, but the defence was, that the segars being made in New York, the label contained a false and fraudulent representation, which equity would not protect. The court below dismissed the bill.

James Parsons, for the appellant.—A trade-mark is a species of property (*Bradley v. Norton*, 33 Conn. 157), and entitled to protection (*Colladay v. Baird*, 4 Phila. 139; *Burnett v. Phalon*, 11 Tiff. (N. Y.) s. c. 3 Tr. App. 167), by injunction against one who imitates the trade-mark so nearly that a purchaser might be misled; a substantial similarity is sufficient: *Bradley v. Norton*, *supra*; *Coats v. Holbrook*, 2 Sand. Ch. 586, and cases cited; *Taylor v. Carpenter*, Id. 603, s. c. in error 611; *Partridge v. Heuck*, Id. 622; *Williams v. Johnson*, 2 Bosw. 1; *Stokes v. Landgraff*, 17 Barb. 608; *Amoskeag Manufacturing Co. v. Spear*, 2 Sand. S. C. 599; *Wolfe v. Goulard*, 18 How. Pr. R.; *Clark v. Clark*, 25 Barb. 76; *Brooklyn White Lead Co. v. Masury*, Id. 416; *Walton v. Crowley*, 3 Blatch. C. C. 440.

The assertions on the label are in a foreign language, and the law presumes, until the contrary is proved, that they were not understood, at least when to assume that the statements were comprehended would charge the person who uttered them with liability: 2 Starkie on Slander 52; Cook on Defamation, pp. 14, 87.

If the words were understood, positive knowledge of what he was buying was nevertheless brought home to every purchaser, and their effect neutralized by, 1st. Palmer’s public declaration

that he was a citizen or permanent resident of the United States, and consequently that the segars which he manufactured were a domestic product, involved in taking out a copyright of his design: *Casey v. Collier*, 56 Niles' Reg. 262, Judge BETTS, 1839; *Keene v. Wheatley*, 9 Am. L. R. 45, Judge CADWALADER, 1860.

2d. The internal revenue and customs regulations. The internal revenue stamp on the box of segars states the kind, quantity, date of inspection, *collection district they are manufactured in*, and the inspector's name: Act of Congress, July 13th 1866; Boutwell's Manual, p. 51, § 91. And the law imposes upon the purchaser, under a penalty, the duty of ascertaining that the inspection has been made: *Id.* § 92.

3d. The requirement, which excludes the possibility of mistake, that *imported* segars must be inspected and stamped before removal from public store or bonded warehouse: Act of Congress, July 28th 1866, Stats. at Large, 1865-6, p. 328.

The assertions, therefore, are innocent in the effect which they produce upon the public. In *Edelsten v. Vick* an article was described as "patented," which signified that it was protected by a patent, though the patent had, in fact, expired. Vice-Chancellor WOOD drew the inference that the dealers in the trade knew that the term had expired, and were not injured by the falsehood; he did not enter into and canvass the motive which induced the plaintiff to assert the untruth: 11 Hare 78, 1853. And in *Dale v. Smithson*, the plaintiff put upon his trade-mark a fictitious name as that of the manufacturer of the article. The court decided that, *as the public was not in fact deceived*, the plaintiff was entitled to their protection: 12 Abbott Pr. R. 237. Until a purchaser has been deceived, no act has been done which gives the law a pretext to interpose. A naked intention to deceive is not a ground for legal action of any kind—least of all for the infliction of a penalty or forfeiture. Intention by itself, unembodied in an act, does not come within the purview of jurisprudence; it is only when coupled with an act that it becomes an important element in determining its character: 2 Austin's Jurisprudence 147; Lord MANSFIELD, *R. v. Scofield*, Cald. 397; *R. v. Higgins*, 2 East 5; Lindley, Juris. xxx., 2; *Smith v. Bowler*, Disney, Rep. 520-26.

Equity lends its aid to make a legal right more effectual: *Farina v. Silverlock*, 6 De G. M. & G. 214; s. c. 39 E. L. & E. 514, 1856. If the title is contested, equity suspends its aid until the

legal right is established : *Pidding v. How*, 8 Simons 477 ; *Singleton v. Bolton*, 3 Doug. 293 ; *Perry v. Truefitt*, 6 Beavan 66. This is the practice ; under liberty granted by Vice-Chancellor WIGRAM, *Rodgers v. Nowill* was tried in 1848 : 5 M. G. & Sc. 109.

A test case at law by the purchaser against the proprietor would require a false representation by the proprietor, his knowledge of its falsity, ignorance on the part of the purchaser that the representation was false, and his acting upon it in the belief that it was true, and injury resulting from such action : *Sykes v. Sykes*, 3 B. & C. 541, 1824 ; s. c. 5 D. & R. 292 ; *Singleton v. Bolton*, *supra* ; *Crayshaw v. Thompson*, 4 M. & G. 357, 1842 ; *Rodgers v. Nowill*, *supra* ; *Behn v. Kemble*, 7 C. B. N. S. 260 ; Eden on Injunction, by Waterman, 25, note 1.

There can be no deception until somebody is deceived : 1 Starkie on Evidence 374 ; Adams's Equity 176 and note ; Story's Equity, § 191, 202-3 ; Broom's Maxims 358.

When the legal title is established at law, as in *Stewart v. Smithson*, 1 Hilt. 119, equity enforces the right : *Dale v. Smithson*, *supra* ; which is vested, and can be forfeited only on legal ground. It is better fortified than the right to a contract which equity rescinds only when an action of deceit could be maintained at law : Sugden on Property, in H. of L. 597-8-9, 406-8, 64 L. L. 398-9 ; Sugden on Vendors 180, ch. 5, § 111, pl. 41 ; 204, ch. 5, § 5, pl. 3 ; Fry on Specific Performance, ch. xii., p. 191 ; xiii., 206, L. L. 100.

The result of the broad proposition that a false statement vitiates the title would be, 1st. To forfeit in this kind of property, though in no other, a man's title, for the slightest taint of fraud.

2d. To give the benefit of this penalty to a confessed pirate, in spite of the Act March 8th 1855, Pamph. L. 514, Purd. Dig. 1155.

3d. To put outside the pale of law property which has at any time been falsely represented in the market, and thus the object of law, to preserve society from internal disorganization, is, to the extent of this excluded property, frustrated.

Theodore Cuyler, for appellee.—Protection is asked from a court of equity for a tradesman's label which is confessedly false, and both calculated and *intended* to deceive and mislead the public.

It is gravely argued that this label, however intended, does not

in fact deceive, because of the words obscurely printed below, "Entered according to the Act of Congress."

So, too, it is said the law requires an imported article to have upon the boxes certain marks of inspection, the absence of which from these boxes shows the label is untrue, and prevents it from deceiving the purchaser.

But the motive is still present, and the fact too, even if this be so—that the unwary and the ignorant are, in fact, deceived and *intended to be deceived*.

The authorities upon this question are very clear and well settled.

Mr. Daniels, speaking of trade-marks, says: "With respect to these cases, it may lastly be observed, that the remedy given in equity is discretionary, and will be withheld if there has been any improper conduct on the part of the plaintiff. On this principle the court has refused to grant an injunction, in the first instance, where the plaintiff has made false representations to the public concerning the article which he seeks to protect:" 3 Daniel's Ch. Practice, p. 1755; and again, p. 1754: "He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."

2 Story's Eq. § 951; *Perry v. Truefit*, 6 Beavan 66; *Millington v. Fox*, 3 M. & K. 338; *Clark v. Freeman*, 11 Beav. 112; *Hogg v. Kirby*, 8 Ves. 226; *Walcott v. Walker*, 7 Id. 1; *Pidding v. How*, 8 Simons 477.

[MR. JUSTICE READ.—There is a recent case decided upon this point by the House of Lords, which has not been mentioned, *The Leather Cloth Co. v. American Leather Cloth Co.*, 11 H. L. 523.]

In *Fowle v. Spear*, 7 Penna. Law Journal 176, the United States Circuit Court refused to protect by injunction the manufacturers of *quack* medicines. A court of equity will not protect worthless articles, or countenance fraud or immorality.

Parsons, in reply.—*The Leather Cloth Co. v. The American Leather Cloth Co.*, cited by Mr. Justice READ, was decided upon the point of similarity; the resemblance was not sufficiently close to make the defendants' stamp a colorable imitation.

There is no doubt that courts of equity refuse to protect quack medicines and noxious drugs: *Woodruff v. Smith*, 48 Barb. 438;

but in such cases no attempt is or could be made to anticipate and counteract the evil effect; the antidote does not accompany the poison. But in this case it is demonstrated that the assertion never in a single instance produced any effect.

The opinion of the court was delivered by

SHARSWOOD, J.—The plaintiff, according to the statements of his bill, is the manufacturer of a cigar, known as the “Golden Crown,” and he has devised a trade-mark, which he uses in its sale. He charges that the defendant, who is a printer by trade, has counterfeited this mark, and sells copies of it to persons engaged in the manufacture and sale of cigars, by whom they are used to his damage. The answer of the defendant admits these allegations; but sets up as a ground for the non-interference of the court, that the articles thus sold by the plaintiff were manufactured in the city of New York, and that the trade-mark in question contains upon it the declaration that they are the product of a “factory of cigars from the best plantations de la Vuelta Abajo, Calle del Agua, Habana.” The case having been heard on bill and answer, the bill was dismissed with costs.

The maxim which is generally expressed, “He who comes into equity must come with clean hands,” Snell’s Principles 33, but sometimes, in stronger language, “He that hath committed iniquity shall not have equity,” Francis’ Maxims 5, has been often applied to bills to restrain by injunction the counterfeiting of trade-marks. The ground on which the jurisdiction of equity in such cases is rested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another: *Croft v. Day*, 7 Beavan 232. “It is perfectly manifest,” said Lord LANGDALE, “that to do this is a fraud, and a very gross fraud.” It is plain that there is no class of cases to which the maxim referred to can be more properly applied. The party who attempts to deceive the public by the use of a trade-mark, which contains on its face a falsehood as to the place where his goods are manufactured, in order to have the benefit of the reputation which such goods have acquired in the market, is guilty of the same fraud of which he complains in the defendant. He certainly can have no claim to the extraordinary interposition of a tribunal, constituted to administer equity, for the purpose of securing to him the profits arising from his fraudulent act.

Thus, in *Pidding v. How*, Simons 477, the plaintiff had made a new sort of mixed tea and sold it under the name of "Howqua's Mixture;" but as he had made false statements as to the teas of which his mixture was composed, and as to the mode in which they were procured, the court refused an injunction; Vice-Chancellor SHADWELL remarking, "it is a clear rule laid down by courts of equity not to extend their protection to a person whose case is not founded in truth." In *Flavel v. Harrison*, 10 Hare 467, an injunction was refused, when an article was sold by the name of Flavel's Patent Kitchener, for which there never had been a patent. In *Leather Cloth Company v. American Leather Cloth Company*, 11 House of Lords Cases 533, though decided on the ground that the mark used by the defendants was substantially different from that of the plaintiffs, yet it may be fairly inferred from all the opinions that, if necessary, the decree of Lord Chancellor WESTBURY would have been affirmed on the broader ground. Thus, a company which had gained reputation by a particular manufacture, on discontinuing their business, transferred their stamp or trade-mark, which indicated them as the manufacturers, to other parties; and it was the opinion expressed that such assignees would not be protected in equity in the use of that mark on goods manufactured by themselves. "So," said Lord CRANWORTH, "in the cases of bottles or casks of wine stamped as being the growth of a celebrated vineyard, or cheese marked as the produce of a famous dairy, or of hops stamped as coming from a well-known hop-garden in Kent or Surrey, no protection would be given to the sellers of such goods, if they were not really the produce of the place from which they purported to come." It is contended, however, that this case is different, because there were marks or words used with these labels inconsistent with the idea that they were held forth as manufactured in Havana. On the label is printed, "Entered according to Act of Congress, A. D. 1858, by Lorin Palmer, in the Clerk's Office of the Southern District of New York." Apart from the fact that this is in such very small type, and so abbreviated, that it would probably escape the observation of every one whose attention was not specially directed to it, a circumstance which rather strengthens the evidence of an intention to mislead the public, what is there in the fact that the design or engraving had been copyrighted in the United States, inconsistent with the

declaration that the cigars, contained in the box, were manufactured in Havana of Cuban tobacco? But, again, it is said that the United States internal revenue stamp would at once deceive the purchaser, there being a difference between the stamp used for articles imported and for those of domestic manufacture. Few persons would stop to notice this difference; and besides, as it is alleged, the trade-mark is pasted on the inside of the lid, and when the box is open for the purpose of retailing, the trade-mark is brought directly in the view of persons wishing to purchase, and the revenue stamp is not seen unless the lid is turned down, and the box examined on the outside. It is contended, further, that the falsehood is in a foreign language, of which it is to be presumed that the plaintiff's customers are ignorant. Yet there is certainly enough to convey to every one, who can read, that the cigars are from "Havana." It is true, that when a slander is uttered in a foreign tongue it is necessary, in an action for damage, to prove that the hearers understood the language; for it will not be presumed that, being ignorant of the meaning of the words, they afterwards repeated them to those who understood them: 2 Starkie on Slander 52; but there is no such rule in an action for a libel in a foreign language, for *littera scripta manet*; that may be read and explained by those who do, to those who do not understand it. The case of a written or printed libel has a much closer analogy to the point before us than that of spoken slander. But above all this, it is not necessary that any one person has been actually deceived or defrauded; it is enough that it is a misrepresentation, calculated to have that effect on the unwary and unsuspecting.

Decree affirmed, and appeal dismissed at the costs of the appellant.

The right to a trade-mark was recognised at an early period in the English law. In *Southern v. How*, decided in the 15th year of James I., Mr. Justice DODDERIDGE cited a case in the time of Queen Elizabeth, which he thus stated: "An action upon the case was brought in the Common Pleas by a clothier,—that, whereas he had gained great reputation for his making of his cloth, by reason whereof he had great utterance, to his

great benefit and profit; and that he used to set his mark to his cloth whereby it should be known to be his cloth; and another clothier perceiving it, used the same mark to his ill-made cloth on purpose to deceive him; and it was resolved that the action did well lie:" Popham 143-4. The different versions of this case are compared in a note at the foot of page 388 of 4 M. & G.'s Reports. It is only, however, within a compara-

tively recent period that the employment of trade-marks has become a general usage. And this increase in the employment of them has, without doubt, arisen from the new use to which trade-marks are at present applied. They no longer serve simply to identify the article upon which they are placed; they also serve as advertisements; and it is the facility with which they can be used as a medium to advertise and bring the article into notoriety, that causes them to come into such general vogue.

It is remarkable, in view of this popular characteristic which trade-marks have acquired, that *Palmer v. Harris* should be the first case of the kind decided by the Supreme Court of Pennsylvania, which has, as yet, been published.

I. As the report of the principal case, taken with the opinion delivered in it, furnishes a full résumé of the points which were presented for adjudication, and were decided by the court, it is unnecessary to recapitulate them. Especially is this the case when every position which was taken to parry the application of the general principle to the particular facts in hand, was effectually turned by the breadth of the proposition which was enunciated. The eminent judge thus sums up the doctrine in the last sentence of his opinion: "But above all this it is not necessary that any person has been actually deceived or defrauded; it is enough that it is a misrepresentation calculated to have that effect on the unwary and unsuspecting." The word "calculated" in this sentence thus taken out of its context, is ambiguous, but restored to its place in the opinion, it means, if it is to have any force whatever, that the party designed to misrepresent, and that it is entirely immaterial whether that design was frustrated or carried into effect. Though it remain a naked intention, never executed, the penalty is the same as if the design were realized, and a purchaser

were deceived. The meaning of the phrase might be thus rendered: It is unnecessary that any person has been deceived or defrauded by the misrepresentation, it is enough that there was an intention to deceive, though it be demonstrated that the intention was never executed, but always remained a bare notion. This is a broad proposition which deserves consideration.

It must be borne in mind that the proprietor of the trade-mark has a vested right of property at law, and can assert his legal title against any invader upon his domain. No counterfeiter or pirate can contest his title on the ground of its being a fraud upon the public; the only person who is permitted at law to raise this objection is the purchaser who has been deceived, and he can recover damages only to the amount he has actually suffered in consequence of the deception. The anomaly is then presented of a perfect legal title, which might, under the Pennsylvania Statute of March 8th 1855, be asserted for the purpose of putting the counterfeiter in prison, and subjecting him to a heavy fine in addition, being forfeited in a court of equity for the benefit of the counterfeiter.

The Roman maxim, *Boni judicis ampliare jurisdictionem*, has certainly been acted upon persistently in this class of cases. The chancellors originally did not presume to decide upon the validity of the title; they referred that question to the courts of law, and during the interval whilst awaiting a determination they suspended their action. This was the origin of the jurisdiction which now overshadows the law. Mr. Justice HILTON, in an interesting historical review of the authorities, has traced the development of this trunk of equity jurisdiction back to its original bulb, and tried, though in vain, to arrest its future expansion: *Dale v. Smithson*, 12 Abb. Pr. R. 237.

Lord WESTBURY, who is not content

to judge men's conduct, but must needs pass sentence upon the motives which they entertain but do not act upon, is the champion for immaculate purity. He says: "Where any symbol or label, claimed as a trade-mark, is so constructed or worded as to make or contain a distinct assertion which is false, I think no property can be claimed in it; or, in other words, the right to the exclusive use of it cannot be protected. The sale of the article stamped with a false statement is *pro tanto* an imposition upon the public; and, therefore, in the case supposed, the plaintiff and the defendant would be both *in pari delicto*." To the objection that any buyer of ordinary discernment would perceive the falsehood, and therefore would not be deceived by the statement, he replied: "I cannot receive it as a rule either of morality or equity that the plaintiffs are not answerable for a falsehood because it may be so gross and palpable that no one is likely to be deceived by it. If there is a wilfully false statement, I will not stop to inquire whether it was too gross to mislead." And he accordingly held that the plaintiffs, who had bought out the Crockett International Leather Cloth Company and had made use of their stamps which reasserted the names of the original manufacturers, the place of their manufactory, and asserted the facts which were untrue, that the cloth was tanned, and the process by which this was done had been patented, could not prevent the defendants from using the same trade-mark, as the plaintiffs were condemned by the principles to which they appealed: *The Leather Cloth Co. (Limited) v. The American Leather Cloth Co. (Limited)*, 33 L. J. R. (1864) 199.

The present Lord Chancellor, HATH-ERLY, takes the view that motives or intentions, unless they are incorporated in an act and thereby produce an effect upon somebody to his detriment, do not come within the vision either of a court

of law or equity. In *Morgan v. Mc-Adam*, the plaintiffs applied the term patent to crucibles which had never been patented. In delivering the opinion he justifies his decision in *Edelsten v. Vick*, saying: "Where a person uses the term 'patent' in a manner which is innocent,—by which I do not mean innocent in the inmost recesses of his mind (for, of course, I cannot consider whether or not these gentlemen supposed they had a patent when in truth they had none at all), but innocent in the effect it may produce upon the public;—what the court must consider is this, how far in protecting him in assuming a title which he has no right to assume, the public are likely to be deceived." He very properly refuses to draw the inference of fact that no one was deceived, and states the reason which discriminates the case from *Edelsten v. Vick*, where he did draw the inference of fact: "I cannot assume in the plaintiffs' favor that everybody who bought these articles must be taken to have such knowledge of the trade that he would know at once that there never had been an English patent respecting it, because, if that is so, why was that term ever adopted at all?" 36 L. J. R. Ch. (1867) 228. The position taken by the present Lord Chancellor accords with the received opinion that neither courts of law nor of equity are courts of casuistry. This has heretofore been considered a fundamental principle of jurisprudence, and Austin, a great authority on the abstract and elemental principles of law, states the proposition with his accustomed strength and clearness: "Intention is not of *itself* wrong, or breach of duty or obligation, nor does it of *itself* place the party in the predicament of guilt or imputability. In order that the party may be placed in that predicament his intention * * must be referred to an act, forbearance or omission of which it is the *cause*:" 2 Jurisprudence

147. It has been the constant boast of English and American lawyers that our system of law did not attempt to judge the conscience of mankind, and this abstention was vaunted as an indication of our advance in intelligence. The endeavors of the church, during the middle ages, to reduce the impulses of the conscience to a set of formulas, resulted in such a perversion of reason and justice that the world abandoned the delusive scheme. Could Chief Justice GIBSON return to his illustrious seat, how startled would he be at the overthrow of what he considered the grand characteristic of his favorite science, the practical wisdom which judges men by their actions and not by their thoughts!

This question becomes more important in consequence of the habit, which is now very general, of using the trade-mark as a medium of advertisement. Its primary object is to identify the article; to indicate where, by whom, and at what manufactory it was manufactured. But its secondary purpose is to declare in an announcement, which is published on the trade-mark, the character of the article. It is the peculiar hardship of the decision rendered in the principal case to forfeit the established and vested right to a trade-mark for the slightest misrepresentation. Such severity is not enforced in any other branch of equity; on the contrary, in the case which furnishes the closest analogy to the forfeiture of a trade-mark, the rescission of a contract, equity refuses to deprive a party of his contract unless a case has been made out upon which an action of deceit could be maintained at law. This, it will be observed, is the rescission of a contract for the benefit of the party who has been deceived, and yet, even between the parties, equity requires a legal ground for the destruction of the legal title. This is consonant with the original doctrine of equity in regard to trade-marks; it suspended its action

until the law had pronounced a decision, and then it lent its aid to make the legal right more effectual.

It is true that slighter grounds will move a court of equity to refuse to carry out, than will induce them to set aside a contract. And as they decline to formalize the reasons of their non-action in the case of a request to enforce the specific performance of a contract, it is unsettled what range of considerations they take into view; though it is generally asserted that they limit their attention to the mutual rights of the two parties before them. If this be the extent of their vision, the administration of substantial justice between the parties can certainly excite no animadversion, nor can it furnish a parallel for the forfeiture of a legal right which no one injured has contested, and on the hypothesis assumed by the learned judge, if not proven by the facts, no one is in the position to contest, as no one could be injured.

II. The learned judge who delivered the opinion of the court, placed the jurisdiction of equity upon the ground of fraud. His language is: "The ground on which the jurisdiction of equity, in such cases, is rested, is the promotion of honesty and fair dealing, because no one has a right to sell his own goods as the goods of another: *Croft v. Day*, 7 Beavan 232. 'It is perfectly manifest,' said Lord LANGDALE, 'that to do this is a fraud, and a very gross fraud.' " This was, perhaps, the received opinion in the time of Lord LANGDALE, but it has long since been exploded. Lord CRANWORTH, in 1856, stated the ground to be the inadequacy of the legal remedies, and the duty of equity to administer preventive justice in order to make more effectual the legal right: *Farina v. Silverlock*, *supra*. This dictum of Lord LANGDALE was cited with approval by the Vice-Chancellor who originally heard the case of the

Leather Cloth Company, and this resuscitation led Lord WESTBURY to exert his strength and put an end to the theory. His demonstration is such a neat piece of reasoning that it deserves to be known, independent of the important principle which it establishes. He says: "First, the goods of one man may be sold as the goods of another without giving to that other person a right to complain, unless he sustains or is likely to sustain from the wrongful act some pecuniary loss or damage. Thus, in the case of *Clark v. Freeman*, 11 Beav. 112, the eminent physician, Sir James Clark, applied for an injunction to restrain a chemist from publishing and selling a quack medicine under the name of 'Sir James Clarke's Consumption Pills;' but the court refused to interfere because it did not appear that Sir James Clarke had sustained any pecuniary injury. Secondly, it is not requisite for the exercise of the jurisdiction that there should be fraud or imposition practised by the defendant at all. The court will grant relief although the defendant has no intention of selling his own goods as the goods of the plaintiff, or of practising any fraud either on the plaintiff or the public. If the defendant adopts a mark in ignorance of the plaintiff's exclusive right to it, and without knowing that the symbols or words so adopted and used are current as a trade-mark in the market, his act, though innocently done, will be a sufficient ground for the interference of a court, as is plain from the decision of Lord COTTENHAM in the case of *Millington v. Fox*, to which I entirely assent, and from the learned Vice-Chancellor's own opinion in the case of *Welch v. Knott*, 4 Kay & J. 747, 751. Imposition upon the public, occasioned by one man selling his goods as the goods of another, cannot be the ground of private action or suit. In the language of Lord THURLOW, in *Webster v. Webster*, 3 Swanst. 490 n., fraud upon

the public is no ground for coming to this court. It is indeed true that unless the mark used by the defendant be applied by him to goods of the same kind as the goods of the plaintiff, and it is in itself such that it might be, and was, mistaken in the market for the trade-mark of the plaintiff, this court will not interfere, because there is no invasion of the plaintiff's right; and thus the mistake of the buyers in the market, under which they, in fact, take the defendant's goods as the goods of the plaintiff, that is to say, imposition upon the public, becomes the test of the property in that trade-mark having been invaded and injured, but it is not the ground on which the court rests its jurisdiction.

"The representation which the defendant is supposed to make, that his goods are the goods of another person, is not actually made otherwise than by his appropriating and using the trade-mark which such other person has the exclusive right to use in connection with the sale of some commodities; and if the plaintiff has an exclusive right so to use any particular mark or symbol, it becomes his property for the purposes of such application, and the act of the defendant is a violation of such right of property, corresponding with the piracy of copyright or the infringement of a patent. I cannot, therefore, assent to the *dictum* that there is no property in a trade-mark. It is correct to say that there is no exclusive ownership of the symbols which constitute a trade-mark apart from the use or application of them, but the word 'trade-mark' is the designation of marks or symbols when applied to a vendible commodity, and the exclusive right to make such user or application is rightly called property.

"The true principle, therefore, seems to be, that the jurisdiction of the court in the protection given to trade-marks rests upon property, and that the court interferes by injunction because that is

the only mode by which such property can be effectually protected. The same things are necessary to constitute a title to relief in equity in the case of the infringement of the right to a trade-mark as in the case of the violation of any other right of property. First, the plaintiff must prove that he has an exclusive right to use some particular mark or symbol in connection with some manufacture or vendible commodity; and secondly, that this mark or symbol has been adopted or is used by the defendant so as to prejudice the plaintiff's custom and injure him in his trade or business:" 33 L. J. R. Ch. (1864) 199; *Hall v. Barrows*, 33 L. J. R. (1864) 204, 207-8.

Millington v. Fox is so well established that a compromise with the proprietor of a trade-mark by a brick-maker who had used it unwittingly at the instance of a customer, was considered the settlement of a legal liability, and the customer was compelled to reimburse him the amount of his expenditure: *Dixon v. Fawcus*, 3 E. & E. (1861) 537.

Had the learned judge in the principal case viewed the trade-mark as a right of property, it may be doubted whether he would have been prepared to go the length which Lord WESTBURY went, and forfeit the title on purely moral grounds. J. P.

Supreme Court of Vermont—General Term, Nov. 1868.

DANIELS v. NELSON.

The doctrine of *fraud in law* as applicable to change of title in personal property without change of possession is merely a kind of rule of evidence prescribing what facts proved shall be held to conclusively show the existence of fraud, and thus creating a kind of estoppel *in pais*.

The rule rests upon grounds of policy only, and its application has been limited to creditors and *bonâ fide* purchasers. It does not apply in favor of a state or county levying a tax.

Therefore, a chattel belonging to A. cannot be levied upon for a tax due by B., although it formerly belonged to B. and still remains in his possession.

THIS was replevin of a mare that was distrained by the defendant on a tax-warrant for a *poll-tax* against the plaintiff's father, that being the only tax against him. The County Court found the legal title to the property to be in the plaintiff, as between him and his father, by a contract made in good faith, and not fraudulent *in fact*. But the court further found and held that the ostensible ownership and possession were so far in the father as to render the mare subject to levy for the tax, even if she would not have been if the plaintiff had taken and kept the exclusive possession and claim of title in himself.